

STATE OF MICHIGAN
COURT OF APPEALS

KIRK ROLLO, as Next Friend for AMANDA
ROLLO, and MEAGHAN KORZENIEWSKI,
Personal Representative of the Estate of DONNA
ROLLO,

UNPUBLISHED
August 25, 2005

Plaintiffs-Appellants,

v

NANCY GUERRESO, KRIS MAZZEI,
MACOMB OAKLAND REGIONAL CENTER,
INC., and SALLY KEYS,

No. 251826
Oakland Circuit Court
LC No. 02-041944-NO

Defendants-Appellees,

and

OAKLAND COUNTY COMMUNITY MENTAL
HEALTH AUTHORITY, FAMILY
INDEPENDENCE AGENCY and HURON
VALLEY HOSPITAL,

Defendants.

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). For the following reasons, we affirm.

¹ "Plaintiff" refers to Kirk Rollo, as next friend for Amanda Rollo. Meaghan Korzeniewski, personal representative of the estate of Donna Rollo, has waived her appeal by failing to raise any issues or present any argument in support of the claim of appeal filed on behalf of Donna Rollo.
(continued...)

I

This action arises from the alcohol-abuse induced death of plaintiff's former wife, Donna Rollo, on January 2, 2002, while she was the primary caretaker of their severely handicapped adopted daughter, Amanda Rollo. Plaintiff and Donna married in 1971 and divorced in 1998. In 1987, plaintiff and Donna adopted Amanda, a severely disabled fifteen-month-old child. Amanda is legally blind and non-verbal. She is unable to walk and has the mental abilities of a nine-month-old child. Donna Rollo ceased her employment as a registered nurse to care for Amanda full-time. In the mid-1990's Donna developed an alcohol abuse problem but never sought treatment. The couple's divorce decree provided they share joint legal custody and Donna retain physical custody of Amanda. On November 13, 2000, Donna contacted Macomb Oakland Regional Center (MORC)² to seek respite care for Amanda. MORC arranged respite care for Amanda, several hours a week, through a short-term facility, beginning in March 2001. Amanda also attended school five days a week.

On May 11, 2001, Elaine Rork, R.N., a neighbor of Donna's, contacted Oakland County Child Protective Services (CPS) complaining of neglect and/or abuse of Amanda by Donna. The matter was assigned to defendant Sally Keys, an intake coordinator. Under CPS procedures, an intake coordinator has thirty days from the date of the referral to make a final determination or file a petition for removal, contingent on whether a preponderance of the evidence substantiates a complaint. Before CPS may petition for removal of a child from a home, both parents must be charged with neglect and all reasonable efforts to keep the child in the home have failed. After conducting a home visit and interviews with family, friends, and school personnel, Keys assessed Rork's complaint as a non-emergency.

Three days after Rork filed her complaint with CPS, plaintiff contacted MORC requesting group placement for Amanda. Little or no action was taken by MORC regarding plaintiff's concerns in deference to Donna's previously documented wishes as the custodial parent to continue Amanda's care in her present environment. Plaintiff did not immediately pursue the matter.

On December 8, 2001 and December 11, 2001, Rork and Meaghan Korzeniewski, the Rollos' eldest daughter, visited Donna in her home. Rork and Korzeniewski believed Donna appeared weak and jaundiced, and on December 12, 2001, they convinced her to go to the hospital. At the hospital, she refused medical treatment and, against medical advice, left the facility that same evening.

Around this same time, plaintiff contacted MORC on December 14, 2001, seeking in-home assistance for Donna and Amanda. Meanwhile, Rork had filed a second complaint with

(...continued)

Rollo's estate. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (a party who fails to brief a question on appeal abandons the issue).

² MORC is non-profit organization that provides, procures and coordinates services for developmentally disabled individuals in Oakland and Macomb Counties through a contract with the Oakland County Community Mental Health Authority.

CPS regarding Donna's alcohol abuse. CPS forwarded the complaint to Keys for further investigation.

Keys contacted plaintiff, who assured her that the family was meeting Amanda's needs and he was making efforts to arrange for additional services via MORC, but his status as the non-custodial parent hindered his efforts. Keys advised plaintiff of potential ways to obtain custody, but plaintiff expressed no interest in obtaining custody of Amanda, explaining that he was physically incapable of caring for her.

Keys also spoke with school officials and was informed that Amanda had missed school nineteen times between October 8, 2001, and December 13, 2001, however, school officials had not seen a noted change in Amanda's cleanliness or health. Keys conducted an in-home visit with Donna on December 13, 2001. Keys' report reflects that the home was fairly clean, properly furnished, and that minimal changes occurred within the home since her previous visit in May, with the exception of a urine smell that Keys attributed to Donna's recent visit to the hospital. Keys' made a preliminary determination that Donna would be given the opportunity to develop a placement plan for Amanda in the event Donna decided to seek substance abuse treatment.

One week later, on December 20, 2001, school officials contacted Keys to report that Amanda's situation had rapidly deteriorated. Amanda had recently missed more school days and that her diaper was not being changed as frequently. Keys attempted to contact plaintiff by telephone. Unable to reach plaintiff, as he was on vacation, Keys contacted Korzeniewski, who communicated that she would visit the house more frequently. Korzeniewski indicated arrangements with MORC regarding Amanda were in process. Keys also spoke with Rork, who indicated that she had visited Donna's home the past four days and was making sure that Amanda was fed and cleaned. Rork confirmed that a plan was in process with MORC to place Amanda. Rork also opined that Donna would not live more than six months.

On December 25, 2001, Keys had another conversation with Korzeniewski. Korzeniewski did not express any concerns and stated that an emergency placement plan for Amanda was in process and that she would continue to visit Donna. While Keys report reflects that the situation had deteriorated greatly, she testified that it was not necessary to file a petition for Amanda's removal because she was reluctant to immediately charge plaintiff with neglect, she had more time to make her decision, and Korzeniewski and Rork indicated that temporary plans were in place for the care of Amanda.

Meanwhile, in response to plaintiff's requests for MORC in-home assistance, Nancy Guerreso,³ a MORC intake supervisor, assigned Kris Mazzei to prepare an in-home evaluation. Mazzei did not find anything amiss during two in-home visits to Donna's residence on December 22, 2001 or December 27, 2001. Mazzei's discussions with Donna revealed that she was receptive to receiving in-home assistance; however, she wished to arrange another meeting with school officials in attendance when school resumed after the holiday break. That meeting did not

³ Nancy Guerreso's name has since changed to Nancy Sinelli.

occur because on January 2, 2002, Donna was found dead in her home. The death certificate reflects that she died on January 2, 2002 and that the immediate cause of death was liver failure. Amanda was found in the home alone with her mother's body and taken to Huron Valley Hospital until an emergency placement could be arranged. She was moved temporarily to a foster care home on January 5, 2002, and currently resides in a group home.

On June 27, 2002, a six-count complaint was filed in circuit court on behalf of Amanda and Donna's estate against all defendants. Plaintiffs alleged, inter alia, that Donna's severe alcoholism prevented her from properly caring for herself or Amanda and that the defendants breached their duty to provide protection and needed services. Specifically, in Count I, plaintiffs asserted a negligence claim on Amanda's behalf, alleging that defendants failed to remove Amanda from her mother's care and provide proper placement services pursuant to the Child Protection Act, MCL 722.623 and the Mental Health Code, MCL 330.1722. In Count II, plaintiff alleged a wrongful death action on behalf of Donna's estate, asserting that defendants, in violation of MCL 400.11a, failed to respond to and report abuse and neglect. Count III alleged defendants were grossly negligent in engaging in conduct "so reckless as to demonstrate a substantial lack of concern for whether injury an injury or a death resulted to [Amanda] or [Donna] . . . [and that such conduct] was equivalent to and in the same class as intentional misconduct." In Count IV, plaintiffs alleged violations of the Social Welfare Act principally alleging defendants breached their duty to file a governmental report to facilitate aid for Donna. Count V raised a Child Protection Act violation, alleging that defendants failed to file a governmental report when they had reasonable cause to suspect abuse or neglect of Amanda. Finally, in Count VI, plaintiff alleged a violation of 42 USC § 1983, arguing defendants violated Donna and Amanda's constitutional rights to life and liberty.

At the conclusion of discovery, defendants filed motions for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). Following a hearing, the trial court ruled from the bench, granting the respective motions and dismissing the complaint. In granting the motions with respect to Guerreso, Mazzei and MORC, the trial court concluded that plaintiffs' complaint failed to establish gross negligence or the existence of a "special relationship." The trial court further determined that a failure to respond to complaints of neglect or abuse does not establish a deprivation of rights under federal law. With regard to Keys' motion for summary disposition, the trial court determined that "[n]either the facts nor applicable law support plaintiffs' claims under the Child Protective Law, . . . MCL 722.621, or the Adult Protection provisions of the Social Welfare Act, . . . MCL 400.11." The trial court granted Keys' motion, concluding that "[c]ivil liability under the CPA arises only when a person is required to report an instance of [abuse]." This appeal ensued.

II

This Court reviews de novo a trial court's grant of summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The applicability of governmental immunity is a question of law which is also reviewed de novo on appeal. *Carr v City of Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003).

In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers the affidavits, depositions, admissions, and other documentary evidence filed by the parties and determines whether they indicate that the defendant is entitled to immunity. A

plaintiff must allege facts justifying the application of an exception to immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing Court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.*

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 260 Mich App 607, 612; 680 NW2d 423 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III

We first address whether the trial court properly determined that Amanda was neither deprived of her constitutional right to protective services nor the attending right of redress under 42 USC 1983 (“§ 1983”).⁴ To establish a § 1983 claim:

[T]he facts, viewed in the light most favorable to the plaintiff, must show that a constitutional violation occurred. If a violation is found, the court must then determine ‘whether the violation involved “clearly established constitutional rights of which a reasonable person would have known.”’ If no constitutional violation occurred, the defendant has qualified immunity from liability. “Qualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’” [*Dean v Childs*, 262 Mich App 48, 53-54; 684 NW2d 894 (2004) (internal citations omitted); see also *Markis v Grosse Pointe Park*, 180 Mich App 545, 553; 448 NW2d 352 (1989) (to sustain a cause of action under § 1983, the plaintiff must establish that: (1) the defendant acted under color of state law; (2)

⁴ 42 USC 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

the conduct deprived the plaintiff of constitutional rights; and (3) the deprivation of rights occurred without due process of law).]

Plaintiff cites *DeShaney v Winnebago County Dep't of Social Svcs*, 489 US 189, 109 S Ct 998; 103 L Ed 2d 249 (1989), as support for their contention that defendants are liable for violating Amanda's constitutional right to state protective services. We reject plaintiff's assertion.

In *DeShaney*, the United States Supreme Court rejected the mother's assertion that the defendant agency's failure to protect the child from his father's abuse, of which the agency knew or should have known, violated the child's due process rights and found that no cause of action existed under § 1983. *Id.* at 194-197. The Supreme Court concluded that the due process clause does not require (1) a state to protect its citizens' lives, liberty and property against invasion by private actors, or (2) a state to guarantee a minimum level of safety and security. *Id.* at 195-196. The Court further concluded that the due process clause cannot be read to impose an affirmative duty on the state to protect one individual from another or to impose liability for injuries that could have been prevented had the state chosen to provide protection. *Id.* at 195-197.

Applying *DeShaney's* reasoning to the facts of the instant case, plaintiff has no cause of action as the "Due Process Clause does not confer an affirmative right to right to governmental aid, including protective services." *Dean, supra* at 54. Generally, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney, supra* at 200. Stated differently, the fact that plaintiff filed complaints with MORC or CPS regarding his preference to change Amanda's circumstances, does not alter the irrefutable fact that the defendant institutions "played no part in [the creation of those circumstances] nor did it do anything to render [Amanda] more vulnerable to them."

Plaintiff further argues that the defendant's actions created the danger to Amanda, and thus were obligated to act. The "state-created danger theory" is one of two recognized exceptions to the general rule that neither the United States nor Michigan constitutions confer an affirmative right to right to protective services. *Dean, supra* at 55. To establish a claim under the state-created danger theory, a plaintiff must show: (1) an affirmative act by the state which either created or increased the risk that he plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff where the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew of should have known that its actions specifically endangered the plaintiff. *Id.*⁵

In this case, plaintiff has failed to establish an affirmative act on the part of defendants. We reject plaintiff's contention that a dangerous situation was created by CPS' failure to seek a

⁵ The second exception, which is not applicable in this case, involves circumstances where the state places a person in custody, which prevents the person from protecting himself and thus creates a "special relationship" that obligates the government to protect the person under a heightened duty. *Dean, supra* at 54, citing *DeShaney* at 196.

petition for removal and MORC's failure to immediately prepare an individualized written plan of services for Amanda under MCL 333.1712. "[A] 'failure to act is not an affirmative act under the state-created danger theory.'" *Simmons v City of Inkster*, 323 F Supp 2d 812, 817 (ED MI, 2004). Further, although not raised by either party, MORC is incapable of creating a dangerous situation under the state-created danger theory as it is a private entity performing a governmental function. MORC does not meet the definition of a "community mental health services program" to assume the obligations under MCL 330.1206. See *In re Blackshear*, 262 Mich App 101, 113; 686 280 NW2d (2004) (a community mental health authority is defined as a separate legal public governmental entity created under MCL 330.1205 to operate as a community mental health services program. A community mental health authority is a legal entity created by a county through an enabling resolution adopted by the county's board of commissioners). See *O'Neill v Emma L Bixby Hosp*, 182 Mich App 252, 256; 451 NW2d 594 (1990) (a private entity's performance of a governmental function does not confer governmental agency status on that entity). Accordingly, the trial court did not err in dismissing plaintiff's 42 USC 1983 claim.

We also find unpersuasive plaintiff's next claim that the trial court erred in granting defendants immunity despite their failure to report child abuse or neglect under MCL 722.623 and MCL 722.633. Generally, under MCL 691.1407(2), "[g]overnmental employees are entitled to immunity from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, are engaged in the discharge of a function, and their 'conduct does not amount to gross negligence that is the proximate cause of the injury or damage.'" See also *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). To establish gross negligence, a plaintiff must establish conduct so reckless as to demonstrate a substantial disregard for whether an injury results. Mere ignorance does not constitute gross negligence. *Xu v Gay*, 257 Mich App 263, 271; 668 NW2d 166 (2003).

However, under MCL 722.633(1), a statutory duty to make a report arises upon "reasonable cause to suspect child abuse or neglect." The statute further provides a civil cause of action for damages proximately caused by failure to report abuse or neglect against persons required to make reports. See *Williams v Coleman*, 194 Mich App 606, 616; 488 NW2d 464 (1992). A person, acting in good faith, who makes a report, cooperates in an investigation, or assists in any other requirement of the Act is immune from civil or criminal liability that might otherwise be incurred by that action. MCL 722.625. A person making a report or assisting in any other requirement of the Child Protection Act is presumed to have acted in good faith. *Id.*

In this case, plaintiff failed to allege sufficient facts demonstrating that immunity does not apply, or that an exception to immunity applies to defeat defendants' motion for summary disposition. First, plaintiff has not shown how defendants' conduct was the proximate cause of Donna's death or that defendants' conduct further contributed to the alleged neglect or abuse of Amanda. In *Robinson*, the Supreme Court defined the phrase "the proximate cause" as used in the employee provision of the governmental immunity act, MCL 691.1407(2), to mean the one most immediate, efficient, and direct cause preceding an injury. Because the conduct of defendants in this case was not "the proximate cause," i.e., the one most immediate, efficient, and direct cause of Donna's alcohol consumption, liver failure and subsequent death, CPS was entitled to governmental immunity. *Robinson, supra* at 445-446. Further, liability under the Child Protection Act arises only for those damages proximately caused by the failure to report. Plaintiff failed to affirmatively establish any damages that were proximately caused by Key's

alleged failure to report. On the record presented, Amanda did not sustain any physical injuries and any alleged psychological injuries cannot be ascertained with any degree of certainty.

In addition, plaintiff has failed to establish that the CPS investigation violated the protocols outlined in the Child Protection Act. MCL 722.628 provides in relevant part:

(2) In the course of its investigation,⁶ the department shall determine if the child is abused or neglected. The department shall cooperate with law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in relation to preventing, identifying, and treating child abuse and neglect; shall provide, enlist, and coordinate the necessary services, directly or through the purchase of services from other agencies and professions; and shall take necessary action to prevent further abuses, to safeguard and enhance the child's welfare, and *to preserve family life where possible*

(3) In conducting its investigation, the department shall seek the assistance of and cooperate with law enforcement officials within 24 hours after becoming aware that 1 or more of the following conditions exist:

(a) Abuse or neglect is the suspected cause of a child's death.

(b) The child is the victim of suspected sexual abuse or sexual exploitation.

(c) Abuse or neglect resulting in severe physical injury to the child requires medical treatment or hospitalization. For purposes of this subdivision and section 17, "severe physical injury" means brain damage, skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprains, internal injuries, poisoning, burns, scalds, severe cuts, or any other physical injury that seriously impairs the health or physical well-being of a child.

(d) Law enforcement intervention is necessary for the protection of the child, a department employee, or another person involved in the investigation.

(e) The alleged perpetrator of the child's injury is not a person responsible for the child's health or welfare.

* * *

(12) After completing a field investigation and based on its results, the department shall determine in which single category, prescribed by [MCL

⁶ The Children Protective Services Manual's "standard of promptness" provides that the completion time for a field investigation is thirty days from the agency's receipt of the complaint.

722.628d] to classify the allegation of child abuse or neglect. [Emphasis and footnote added.]

The specific categories to which a determination is classified are outlined in MCL 722.628d:

(a) Category V - services not needed. Following a field investigation, the department determines that there is no evidence of child abuse or neglect.

(b) Category IV - community services recommended. Following a field investigation, the department determines that there is not a preponderance of evidence of child abuse or neglect, but the structured decision-making tool indicates that there is future risk of harm to the child. The department shall assist the child's family in voluntarily participating in community-based services commensurate with the risk to the child.

(c) Category III - community services needed. The department determines that there is a preponderance of evidence of child abuse or neglect, and the structured decision-making tool indicates a low or moderate risk of future harm to the child. The department shall assist the child[']s family in receiving community-based services commensurate with the risk to the child. If the family does not voluntarily participate in services, or the family voluntarily participates in services, but does not progress toward alleviating the child's risk level, the department shall consider reclassifying the case as category II.

(d) Category II - child protective services required. The department determines that there is evidence of child abuse or neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child. The department shall open a protective services case and provide the services necessary under this act. The department shall also list the perpetrator of the child abuse or neglect, based on the report that was the subject of the field investigation, on the central registry, either by name or as "unknown" if the perpetrator has not been identified.

(e) Category I - court petition required. The department determines that there is evidence of child abuse or neglect and 1 or more of the following are true:

(i) A court petition is required under another provision of this act.

(ii) The child is not safe and a petition for removal is needed.

(iii) The department previously classified the case as category II and the child's family does not voluntarily participate in services.

(iv) There is a violation, involving the child, of a crime listed or described in section 8a(1)(b), (c), (d), or (f) or of child abuse in the first or second degree as prescribed by section 136b of the Michigan penal code, 1931 PA 328, MCL 750.136b.

In this case, plaintiff's complaint fails to state a legally cognizable statutory cause of action under the Child Protection Law with respect to either plaintiff's claim against defendant institutions or the individual defendants. The plain language of MCL 722.628d provides that family life should be preserved where possible, absent evidence of physical abuse, neglect, or serious physical injury.

With regard to the CPS investigation, the record evidence shows that Keys, in accordance with MCL 722.628d, made reasonable efforts to maintain Amanda's current family setting. Donna expressed a willingness to receiving in-home assistance. Korzeniewski and Rork increased their visits to the residence and further indicated that a placement plan was in process for Amanda. While the record reflects that Amanda missed school, the evidence shows Donna expressed a desire to meet with school officials following the holiday break. Given this evidence, coupled with evidence that plaintiff continued with his holiday vacation plans, a rational finder of fact could determine that Amanda's circumstances were not so dire to require immediate intervention. Accordingly, we conclude plaintiff failed to present evidence to rebut the presumption of and evidence of good-faith on the part of Keys. "[A] protective services worker's good-faith decision to continue an investigation of child abuse [is] a discretionary decision and therefore immune from suit." *Williams, supra* at 618.

We also find that the trial court did not err when it granted summary disposition to MORC, Mazzei, and Guerreso. While the individual MORC defendants have a duty under the Child Protection Act to report suspected child abuse or neglect if they have reasonable cause to suspect abuse or neglect, *Williams, supra* at 618-619, we note plaintiff's contacts with MORC were not intended to initiate a petition for removal of Amanda from the home per se, but rather reflected his desire to obtain in-home assistance. Thus, MORC's minimum contacts with the Rollo home were designed to evaluate eligibility for additional services.

We find no error in Mazzei's evaluation or in Guerreso's acceptance of that evaluation. No evidence was provided that could lead a rational trier of fact to conclude that Mazzei witnessed abuse or neglect during her two visits in December 2001 to trigger a duty to report. It is axiomatic that where there is no first hand observation of any risk of abuse or neglect, there is no duty to report. However, even assuming MORC or the individual defendants, Mazzei or Guerreso, had filed a report, plaintiff presented no evidence to establish how the report would have altered the ongoing CPS investigation.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly